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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions	3
Statement of the Case	3
Reasons for Granting the Writ	9
I. The court below frankly conceded its own inability properly to dispose of this case	9
II. The time has come to subject Organized Baseball's reserve system to scrutiny under the federal antitrust laws	9
III. The court below ignored controlling decisions of this Court in failing to apply state antitrust law to Organized Baseball's reserve system	13
IV. Organized Baseball should not be allowed to maintain, under the imprimatur of this Court, in one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve system	19
Conclusion	20

TABLE OF AUTHORITIES

CASES CITED:

Allen Bradley Co. v. *Local No. 3*, 325 U.S. 797 (1945) . . 21
American League & Ass'n of Umpires, 180 N.L.R.B. No. 30, Case 1-RC-10414 (December 15, 1969) ... 20
Bibb v. *Navajo Freight Lines*, 359 U.S. 520 (1959) ... 15
Blonder-Tongue Labs. v. *University Foundation*, — U.S. —, 39 U.S.L.W. 4506 (May 3, 1971) 12
Colorado Comm'n v. *Continental*, 372 U.S. 714 (1963) 15

Page

Commonwealth v. *McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950) 18
Federal Baseball Club v. *National League*, 259 U.S. 200 (1922) 2, 7, 8, 9, 10, 13
FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966) 12
Giboney v. *Empire Storage Co.*, 336 U.S. 490 (1949) ... 8
Haywood v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) 11
Head v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963) 17
Helvering v. *Hallock*, 309 U.S. 106 (1940) 13
Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960) 14
Lear v. *Adkins*, 395 U.S. 653 (1969) 11
Meat Cutters v. *Jewel Tea*, 381 U.S. 676 (1965) 21
Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) 2, 9, 12
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 15, 16
Radovich v. *National Football League*, 352 U.S. 445 (1957) 4, 10, 21
Salerno v. *American League*, 429 F.2d 1003 (2d Cir. 1970), cert. denied sub nom. *Salerno* v. *Kuhn*, 400 U.S. 1001 (1971) 9, 10
Simpson v. *Union Oil Co.*, 396 U.S. 13 (1969) 11
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) .. 16
Teamsters Union v. *Oliver*, 358 U.S. 283 (1959) 21
The Boys Markets, Inc. v. *Retail Clerk's Union*, 398 U.S. 235 (1970) 12
The Harrisburg, 119 U.S. 199 (1886) 9, 12
Toolson v. *New York Yankees*, 346 U.S. 356 (1953) 2, 7, 8, 9, 10, 11, 12, 13, 15, 19
United States v. *International Boxing Club*, 348 U.S. 236 (1955) 10
United States v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460 (1949) 21
Wisconsin v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966) 15, 20

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const, Art. I, Sec. 8 ..... 46a

15 U.S.C. § 1 ..... 46a

15 U.S.C. § 3 ..... 46a

Cal. Bus. & Prof. Code, § 16600 ..... 46a

Mich. Ann. Laws § 28.62 ..... 46a

MISCELLANEOUS SOURCES CITED:

21 Cong. Rec. 2457, 51 Cong., 1st Sess. (1890) 17

H.R. Rep. 1707, 51st Cong., 1st Sess. (1890), p. 1 17

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Lefkowitz, Antitrust Enforcement For Consumer Protection, 1969 New York State Bar Ass'n Antitrust Law Symposium, p. 16 17

Note, 61 Colum. L. Rev. 1469 (1961) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Curtis C. Flood prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 7, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The opinion of the District Court (Appendix B) is reported at 316 F. Supp. 271 (S.D. N.Y. 1970).

JURISDICTION

The Court of Appeals entered judgment (Appendix C) on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Finding itself in "a most frustrating predicament," and blaming the "vagaries of fate," the court below confessed it was helpless to decide this case properly. Accordingly, it declined to determine the lawfulness of Organized Baseball's "reserve system" under either federal or state antitrust law. On the one hand, the Second Circuit felt "compelled" to follow *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922) and *Toolson* v. *N. Y. Yankees*, 345 U.S. 356 (1953)—the concededly anomalous decisions of this Court which held that Organized Baseball is not "interstate commerce." On the other hand, the Second Circuit rejected petitioner's state law claims for precisely the opposite reason—that Baseball *is* "interstate commerce" and somehow entitled to immunity from state antitrust regulation.

The questions presented are:

(1) Should not this Court, in the exercise of its supervisory power, rectify this bizarre result and thus preserve "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne* v. *States Marine Lines*, 398 U.S. 375, 403 (1970)?

(2) Have not subsequent decisions of this Court, and developments in professional sports, so undermined *Federal Baseball Club* and *Toolson* that they may no longer shield Organized Baseball's reserve system from the federal antitrust laws?

(3) Even assuming *Federal Baseball Club* and *Toolson* are to stand, may Organized Baseball be insulated from all state antitrust regulation, thus creating a unique "no-man's-land"?

(4) May the federal courts curtail the reach of all state antitrust statutes on a wholesale basis, without

conducting any "particularized inquiry" into the nature of the statutes or their impact upon interstate commerce, and with no finding that they violate any federal constitutional provision, or conflict with any federal statute or with one another, or intrude into an area which Congress has affirmatively found should be free of state antitrust regulation, or discriminate against interstate commerce?

(5) May Organized Baseball continue successfully to maintain:

(a) to the courts: that only Congress can correct the abuses of Baseball's reserve system;

(b) to the Congress: that the courts are adequate and legislation unnecessary;

(c) to proponents of federal regulation: that state regulation suffices; and

(d) to proponents of state regulation: that federal regulation alone may be applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory materials are set out in Appendix D.

STATEMENT OF THE CASE

1. The Complaint

Petitioner brought this action in the United States District Court for the Southern District of New York on January 16, 1970 to challenge the legality of Organized Baseball's "reserve system," the archaic scheme which binds every American professional baseball player to one team, or its assignee, for life.

His suit arose out of the October 1969 "trade" by which the St. Louis Cardinals—for whom he had played for twelve years as a star centerfielder and frequent

.300 hitter—abruptly sent him to the Philadelphia Phillies. Despite his long service, his position as Cardinal co-captain, and his deep business and personal roots in St. Louis, he had not been consulted about the trade; his "owner" told him about it only after the fact.

Petitioner filed suit after the Commissioner of Baseball denied his request that he be made a "free agent," at liberty to seek employment with other teams. Petitioner focused his attack on Organized Baseball's interrelated set of rules and agreements which forced him—at age 32—to choose between playing baseball for Philadelphia and abandoning his highly successful career.[1]

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[1] Despite the offer of a lucrative salary and his awareness of the physical toll such a decision would wreak at this stage in his career, petitioner out of conviction declined to play for Philadelphia, and accordingly missed the entire 1970 season. During the pendency of the appeal below, Philadelphia sold its exclusive right to negotiate with petitioner to the Washington Senators. By agreement among the parties to this litigation, petitioner's decision to accept Washington's terms for the 1971 season was without prejudice to this case. Events showed, however, that the year's forced layoff had eroded petitioner's skills. He left the team and is not now playing in Baseball.

Wholly apart from the parties' agreement, these events do not moot this case, in which petitioner seeks treble monetary damages. The success of the boycott, after all, cannot insulate it from judicial scrutiny. See *Radovich* v. *National Football League*, 352 U.S. 445 (1957), where the complainant was able to obtain judicial relief from professional football's reserve system after a protracted boycott had ended *his* career. Like Radovich, petitioner has been sorely damaged by the group boycott complained of, having lost his total salary for 1970 of over $100,000 and suffered impairment of his career. He is entitled to dissolution (or domestication) of the reserve system and to compensation. Moreover, the vast majority of petitioner's fellow players have a stake in the outcome of this case, for they continue to bear the brunt of the system.

Petitioner filed an action against the twenty-four major league teams comprising both major leagues, the presidents of the two leagues, and the Commissioner of Baseball. Count I of the complaint charged that defendants violated the federal antitrust laws by their reserve system and their insistence that petitioner play baseball in Philadelphia or nowhere. Count II, based on diversity of citizenship and naming eleven defendants, asserted that the reserve system and defendants' boycott violate the antitrust laws of New York, California and other states, as well as civil rights statutes. Count III, which named thirteen defendants, asserted that the reserve system and the boycott violate the common law.[2]

Plaintiff seeks a declaration that the reserve system is unlawful, an injunction against the boycott, and triple the monetary damages he has sustained since December 30, 1969.

2. The Trial

The reserve system was shown at trial to be a closely interrelated set of agreements and provisions which uniquely restrict player freedom. For example, Major League Rule 3(a) requires every player to sign a Uniform Player's Contract. The evidence showed that the Commissioner of Baseball has *never* permitted deviation from the imposed terms of that contract. Section 10(a) of the Contract provides that if a player does not sign with the club which had his last contract by

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[2] Count IV charged thirteen of the defendants with imposing upon petitioner a form of peonage and involuntary servitude proscribed by 42 U.S.C. § 1994, 18 U.S.C. 1581, and the Thirteenth Amendment to the United States Constitution, as well as depriving him of his "freedom of labor" in violation of 29 U.S.C. §§ 102 and 103. Petitioner does not argue the issue here, but reserves it should the Court issue a writ of certiorari not otherwise limited.

March 1, the club may *unilaterally* renew his contract and cut his salary. Each renewed contract contains the same renewal provision. Section 6(a) authorizes a club to assign a player's contract to any other club, without consultation with the player and without his consent. Thus, the contract in toto binds the player to the club that "owns" him, or its assignee, in perpetuity.

In 1965, this reserve system was extended for the first time to potential new players who have never signed an agreement with any club. A semi-annual draft was devised wherein a drafted potential new player may only bargain with that club which chose him in the involuntary draft.

As the trial court concluded, "From the standpoint of the professional baseball player, its effect [the system's] is to deny him throughout his career freedom to choose his employer." 316 F. Supp. at 273.

The reserve system was tested in the crucible of a three-week trial. As the trial court later said, it was "the first time in almost fifty years [that] opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law." 316 F. Supp. at 284. Former ball players, former team owners, executives from other sports, the executive director of the Baseball Players Association, and a distinguished economist testified on behalf of petitioner. With one exception, the witnesses for respondents were the respondents themselves or their employees.

Although the issues tried at great length were the "reasonableness" of the reserve system and the carefully documented contention that much less onerous alternatives—lawful ones—would sufficiently protect

the legitimate interests of Organized Baseball,[3] the trial court ultimately declined to reach these issues. It held that Organized Baseball's reserve system was beyond the reach of both federal and state law.

3. The Appeal

On April 7, 1971, the Court of Appeals for the Second Circuit affirmed. In doing so, it confessed its inability properly to dispose of the case on its real merits.

As to petitioner's federal antitrust claims, the court held that the lower courts are bound by the *Federal Baseball Club* ruling that Organized Baseball is not subject to the Sherman Act because its "exhibitions" are local affairs and not "interstate commerce." The court conceded that *Federal Baseball Club* and *Toolson* were "seemingly inconsistent" with the Court's later

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[3] These alternatives, as listed by the trial court, 316 F.Supp. at 275, n. 12, were:

> "Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221-22, 235, 237-38, 247, 255-58, 1966-67, 1981-84, 1985-86, 2020-23."

These were proposed by petitioner to indicate the availability of lawful alternatives to the present stifling system which petitioner contends is a *per se* violation of federal and state antitrust laws.

U.S. 445 (1957), that professional football's similar, but less onerous, reserve system was subject to the anti-trust laws. (App. 3a) And the Court read recent decision in *Radovich* v. *National Football League,* 352 cases to indicate that this Court would no longer infer ratification of prior decisions from congressional silence. Nonetheless, the Second Circuit concluded it was not free to set aside *Federal Baseball Club* and *Toolson*—relief, it said, must come from this Court.

As to petitioner's state antitrust law claims, the Court of Appeals impaled petitioner on the second horn of a dilemma which, Judge Waterman confessed, put petitioner "in a most frustrating predicament." (App. 7a) Although Baseball was held not "interstate commerce" for federal purposes, the Second Circuit held that, for purposes of state law, baseball not only is "'interstate commerce," but is so "uniquely interstate" as to preclude state regulation. The Court conceded that state antitrust regulation is ordinarily not pre-empted by federal antitrust law. *Giboney* v. *Empire Storage Co.,* 336 U.S. 490, 495 (1949). But without examining the law of any particular state, the court advanced the novel idea that the states' interest in antitrust regulation must be subordinated to Baseball's asserted need to be free from compliance with the "strictest state antitrust standard."[4]

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[4] The court reasoned that because of Baseball's structure, it might find it necessary to comply with that state rule which was most stringent. (App. 6a-7a) It did not indicate which standard or state that was, or whether such a standard would differ from that found in the federal antitrust laws. Our own research, set out in a fully documented appendix to our briefs below, indicates that the standards are essentially the same, that there is no problem of diverse regulation.

The court admitted the incongruity of thus giving petitioner the worst of both worlds. But it disclaimed responsibility:

> "Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court." (App. 8a)

REASONS FOR GRANTING THE WRIT

I. The court below frankly conceded its own inability properly to dispose of this case

After a lengthy trial in which opponents and proponents of the reserve system finally had their day in court, in which proposals sharply to reduce the restrictive nature of the reserve system were aired and considered, and Baseball's claimed "reliance" interest was exposed as a sham, the issue has been left undecided because, according to Judge Waterman:

> "On the one hand, the doctrine of stare decisis binds the plaintiff because of an initial holding that baseball is not 'interstate commerce' within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of 'interstate commerce,' he is now told that baseball regulation cannot apply." (App. 7a)

It is no exaggeration to say, we suggest, that this nation reads the sports pages with rather greater care than its front pages. And it is no service to public respect for justice for the courts to render such plainly incongruous judgments.

II. The time has come to subject Organized Baseball's reserve system to scrutiny under the federal antitrust laws

The simplest way to resolve the dilemma described by Judge Waterman is for this Court to overrule *Fed-*

eral Baseball Club and *Toolson.* Like *The Harrisburg,* 119 U.S. 199 (1886), they "rested on a most dubious foundation when announced, [and have] become an increasingly unjustifiable anomaly as the law over the years has left [them] behind." *Moragne* v. *States Marine Laws,* 398 U.S. at 404.

The case for doing so has been well made by Judge Friendly, writing in *Salerno* v. *American League,* 429 F. 2d 1003, 1005 (2d Cir. 1970), cert. denied sub nom. *Salerno* v. *Kuhn,* 400 U.S. 1001 (1971):

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' *Radovich* v. *National Football League,* 352 U.S. 445, 452 (1957) . . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom."

It needs no argument to demonstrate that Organized Baseball is now "interstate commerce." Both courts below so held, and respondents agreed. This Court has already ruled to that effect in connection with other professional sports. *Radovich* v. *National Football League,* 352 U.S. 445 (1957); *United States* v. *International Boxing Club,* 348 U.S. 236 (1955). No reason exists why Baseball should be treated differently.

As for *Toolson,* where the Court declined to reexamine *Federal Baseball Club* and referred the parties

to Congress for a remedy, subsequent events have totally undermined its continued vitality.

1. Since *Toolson* was decided in 1953, the Court has held all other professional sports, and their more benign versions of the reserve system, to be subject to the federal antitrust laws. *Radovich* v. *National Football League, supra; United States* v. *International Boxing Club, supra.* In those decisions, the Court conceded there was no logic in distinguishing other sports from Baseball. With the passage of time, any such distinction has grown increasingly untenable. Were petitioner a linebacker or a forward, rather than a centerfielder, his right to test professional football's or professional backetball's reserve systems would be undisputed. See, *e.g., Haywood* v. *National Basketball Ass'n,* 401 U.S. 1204 (1971).

2. Baseball has itself changed since 1953. The major leagues have grown from sixteen to twenty-four clubs. Franchises have become mobile, moving from city to city. National television revenues have become a major source of income. The reserve system itself has grown more restrictive. When *Toolson* was decided, potential new players were free to select their first employer from among competing clubs. Twelve years later, even this limited area of choice was stamped out. Since 1965, potential new players have been stripped of their once-held freedom to choose their initial employer and now may negotiate only with the club which drafts them in the new semi-annual draft. In short, baseball has become even more commercial, and the reserve system, more restrictive.

3. The so-called "reliance" interest which led the Court in 1953 to decline to grant a retroactive judicial

remedy is no longer a factor.[5] See *Lear* v. *Adkins*, 395 U.S. 653, 674 n. 19 (1969), where the Court overruled prior doctrine, suggesting that any "reliance" interest had been diminished by erosion of the doctrine itself, that the Court was not able to perceive that real harm would flow, and that the "public's interest" had to be weighed in the balance. Since 1953, investors in baseball have witnessed the reserve systems in other sports modified under the aegis of the federal antitrust laws—without *any* of the dire consequences predicted in *Toolson*. Indeed, baseball is widely recognized to have lost ground to these sports. Investors have known that either Congress or the courts might any day strike down or modify Baseball's reserve system. At trial in the present case, Organized Baseball's witnesses conceded that they had never assumed that state antitrust law might not be applied (Tr. 1261-62, 1396, 1531), or that Congress or the courts might not modify or eliminate the reserve clause. Some testified they preferred Congress to the courts because Congress would not impose retroactive liability and because it would give them a full hearing. (Tr. 1244, 1360) But petitioner seeks only prospective relief, and a full hearing they have now had—in the trial court here. Finally, developments in other sports and the record in this case demonstrate that what is involved is not destruction of the reserve system, but only its modification so as to legalize it and increase player freedom without jeopardizing Baseball's legitimate interests.

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[5] We perhaps should note that petitioner here seeks prospective relief only, measuring his damages from the date—December 30, 1969—when the Commissioner of Baseball refused to declare him a "free agent." See *Simpson* v. *Union Oil Co.*, 396 U.S. 13 (1969).

4. Recent decisions of this Court have reinvigorated the rule that it will not regard congressional inaction after controversial judicial decision as legislative ratification of that decision. See *Blonder-Tongue Labs.* v. *University Foundation,* —— U.S. ——, —— n. 17, and —— n. 37, 39 L.W. 4506 (May 3, 1971) (bills to reverse a prior decision had died in committee); *The Boys Market, Inc.* v. *Retail Clerk's Union,* 398 U.S. 235 (1970); and *Moragne* v. *States Marine Lines,* 398 U.S. at 393, 405 n. 17.[6] See also, *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 609 (1966), and *Helvering* v. *Hallock,* 309 U.S. 106, 120 (1940).

5. Reconsideration of *Federal Baseball Club* and *Toolson* would be particularly appropriate. As the record in this case shows, the average professional life of a ball player—few of whom achieve the longevity of petitioner or of a Willie Mays—is only five years. Nearly four generations of ball players, therefore, have been subjected to a group boycott enforced by blacklists while Baseball fended off legislative action through one device or another. Where so much is at stake, and where the affected persons' careers are so short, an eighteen-year waiting period is long enough.

III. The court below ignored controlling decisions of this Court in failing to apply state antitrust law to Organized Baseball's reserve system

In insulating Organized Baseball's reserve system from all state antitrust regulation, the court below did not follow controlling decisions of this Court.

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[6] Congressional deference to the courts in fashioning "the controlling rules of admiralty law," referred to in *Moragne* as justification for reconsidering *The Harrisburg,* is at least equaled by Congress' historical reluctance to amend the basic provisions of the Sherman Act.

Once the Court of Appeals determined to follow *Federal Baseball Club*, it ought to have done so across the board: it should have concluded—as Baseball had itself argued in *Federal Baseball Club*—that state and local laws are applicable if federal law is not. But when the court turned to petitioner's state law claims, it accepted respondents' position that Baseball was indeed "interstate commerce." It then compounded the error by ruling, without the "particularized inquiry" mandated by an unbroken line of decisions of this Court, that Baseball's involvement in "interstate commerce" insulated it from all state antitrust laws.

While granting that the various state antitrust provisions do not appear to impose conflicting duties, the court held, without examining the law of any particular jurisdiction, that the states had insufficient interest in their antitrust laws to warrant imposing whatever this undefined burden was upon Baseball. It simply declared that

> "we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." (App. 7a)

The court was not able to cite any authority for the proposition that non-discriminatory state antitrust laws should be given an inferior place in the hierarchy of state values, or for the proposition that Baseball's self-interest was to be given more weight than the states' public interest in curbing group boycotts and blacklisting of professional baseball players.

There is no basis in the decisions of this Court under the Commerce Clause for this wholesale displacement of state antitrust laws.

Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440, (1960), announced the two-part standard to be used in determining when non-discriminatory state regulation affecting interstate commerce is permissible. Mr. Justice Stewart wrote that:

> "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on maritime activities or interstate commerce."

The first of these two standards—that Congress has shown a requisite "clear and manifest purpose" to occupy the field—is surely not met here. And the Court below did not hold that it is.[7] (App. 5a)

Nor is the second standard—undue burden on commerce—met here. In determining whether state regu-

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[7] The trial court in this case did base pre-emption partly on legislative inaction after *Toolson*. And two of the seven members of the state court in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966), took a similar position. But recent cases of this Court do not permit an inference of ratification from mere failure to legislate. Affirmative action whose meaning cannot be mistaken has always been required. And it would be particularly inappropriate here where *per se* violations of antitrust law are challenged and where Baseball has argued to one forum after another that state regulation *was* applicable. It should be noted that three members of the Wisconsin court held that state law *should* apply. (Two others joined a four-man majority in favor of Baseball, but on another theory.) In any event, the Wisconsin case is easily distinguished from the present one, for it involved a species of local protectionism—keeping a local enterprise at home—always suspect under the Commerce Clause. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

lation is unduly burdensome, this Court has always insisted upon what Mr. Justice Black has termed "the importance of a particularized inquiry into the existence of a burden on commerce." *Colorado Comm'n* v. *Continental,* 372 U.S. 714, 720 (1963). And it has never displaced even a single state's law without the most careful and scrupulous examination of the precise regulation involved, its purpose, and its impact upon the activity to be regulated. See, e.g., *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). Evenhanded state regulation is uniformly sustained except where there has been a showing (1) of actual irreconcilable conflict with applicable laws of another jurisdiction, *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959) (displace Illinois mudguard law which imposes duty inconsistent with those imposed by sister states), and *Colorado Comm'n* v. *Continental, supra,* (sustain an antidiscrimination law where no conflict shown with valid law of another jurisdiction), or (2) of an intolerable—but clearly defined—imposition on an industry or particular enterprise, *Pike* v. *Bruce Church, Inc.,* 397 U.S. at 144-146.

Here, there has been no showing either of conflict between applicable laws, or of unacceptable harm to Baseball. Indeed, the courts below conceded that there appears to be uniformity among the applicable statutes (App. 6a), and that Baseball could accommodate a much less onerous system of controlling its players (App. 38a).

Moreover, the only proper remedy where a state law is found too burdensome is to displace *that particular law.* There is no precedent in the decisions of this Court for immunizing an entire industry from regulation by *any* state on the ground that *one* state might

have a statute which cannot permissibly be applied to the industry. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), where the court displaced one state's statute—but left the railroads subject to the less stringent laws of all other states.

The court below predicted that Baseball will adjust to the "most stringent" regime laid down by any state in which it operates—just as interstate merchants now adjust to the toughest state standard on what "cooling off" provisions they must offer to door-to-door customers, and what kinds of finance charge disclosures they must make. Absent federal occupation of the field —and the Court of Appeals found none—all the Commerce Clause does for an enterprise not subjected to conflicting duties is to protect it against "a most stringent" law which goes too far. It does not provide protection against those laws which do not offend.

The decision below also seriously misconceived the complementary relationship of state and federal antitrust regulation. Senator Sherman in 1890 expressly justified the bill which became the Sherman Act on the ground that its "single object" was to "*supplement* the enforcement of the established rules of common law and statute law by the courts of the several states." 21 Cong. Rec., 51 Cong., 1st Sess. (1890), 2457. (Emphasis supplied) The House Report on the Sherman Act stated that federal legislation "will prove of little value unless the states shall *supplement* it by such auxiliary and proper legislation as may be within their legislative authority." H.R. 1707, 51st Cong., 1st Sess. (1890), 1. (Emphasis supplied) State antitrust law has, in fact, developed in parallel or supplementary form, rather than in conflict with federal antitrust law. See Lefkowitz, "Antitrust Enforcement for Consumer Protection," 1969 New York State Bar Association

Antitrust Law Symposium, 16-20. For all practical purposes, state antitrust law is nothing more than a grant of supplementary authority to local officials and state courts to enforce substantive provisions which are carbon copies of the first two sections of the Sherman Act, plus prohibitions against deceptive trade practices[8]—precisely the kind of supplementary state regulation permitted by this Court in *Head* v. *Board of Examiners,* 374 U.S. 424, 431 (1963). See especially Mr. Justice Brennan's concurring opinion, 374 U.S. at 441-446, on the relationship of the FCC and the FTC to state regulation.

Finally, the decision below unnecessarily diminishes state antitrust law—indeed paralyzes it. The rationale of the court jeopardizes, for example, developing state efforts to protect consumers against companies engaged in interstate commerce but not now adequately regulated by federal law. If Baseball's self-interest in avoiding state regulation is superior to the states' public interest in dealing with group boycotts and blacklists directed against their citizens, why is a door-to-door seller's similar self-interest not superior to a state's interest in giving its citizens three days to cancel each sale? Or in requiring disclosure of the ultimate finance charges? And what other legitimate public interests are threatened with subordination to private interest on the theory espoused below? As one distinguished state court has observed,

> "If state laws have no force as soon as interstate commerce begins to be affected, a very large area

[8] Note, 61 Colum. L. Rev. 1469 (1961). See John Bodner's annual surveys of state antitrust law in 39 Antitrust L.J. 755 (1970); 38 Antitrust L.J. 555 (1969); 37 Antitrust L.J. 609 (1968). And see the illustrative state statutes set out in Appendix D.

> will be fenced off in which the states will be practically helpless to protect their citizens without . . . a corresponding contribution to the national welfare." *Commonwealth* v. *McHugh*, 326 Mass. 249, 265, 93 N.E. 2d 751, 762 (1950).

Never before has this Court authorized the wholesale displacement of state statutes which have not been shown to be discriminatory or to conflict with one another or with federal law, or to threaten a genuine and carefully defined harm to an interstate activity, which harm outweighs the local public interest. Never before has it pre-empted the laws of every state on the ground that one such law—were it to be examined—might prove offensive.

This decision requires plenary review.

IV. Organized Baseball should not be allowed to maintain, under the imprimatur of this Court, in one forum after another that "some other forum" is the appropriate one to deal with the abuses of its reserve system

For half a century, Organized Baseball has succeeded in persuading one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve clause. In its brief to this Court in 1922, Organized Baseball argued that baseball should be exempted from federal antitrust regulation because

> "a state is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy."

Resp. Br., No. 204, 1921 Term, p. 67. It then told Congress that the federal courts were available. In the words of the Celler Subcommittee's 1952 report, Baseball

> "represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause

> will be tested [in the courts] by the [Sherman Act's] rule of reason." H.R. Rep. 2002, 82d Cong., 2d Sess. (1952), 231.

Then, in 1953, Baseball successfully—if opportunistically—argued to this Court in *Toolson* that it ought not to subject the reserve system to the Sherman Act's "rule of reason" because Baseball was sufficiently regulated by state law. Respondent New York Yankees told this Court that a baseball game in Los Angeles is only

> "a local affair subject to the regulatory powers of the State of California and the City of Los Angeles."

Br. p. 30. But in 1966, Baseball argued to the Wisconsin state court that only *federal* law could regulate baseball adequately. *Wisconsin* v. *Milwaukee Braves, Inc.,* 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966). Then, in 1969, Baseball insisted in the National Labor Relations Board that any labor dispute in the sport would *not* substantially affect interstate commerce and, in any event, baseball was now international in its operations. *American League & Ass'n of Umpires,* 180 N.L.R.B. No. 30, Case 1-RC-10414 (Dec. 15, 1969).

Baseball cannot have it all ways—to stave off state regulation on the ground that only federal regulation is adequate, federal regulation on the ground that state regulation will suffice, the courts on the ground that legislation is necessary, and legislation on the ground that the courts will do.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the decision below.[9]

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[9] Petitioner has not addressed the contention advanced by respondents at trial but not reached by the courts below, that the reserve system is a matter for collective bargaining and hence exempt from state and federal antitrust laws under *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), and *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). Neither of these decisions holds that an *employer* conspiracy to restrain trade is exempted from antitrust regulation where an employee group has become implicated in the scheme. No Justice participating in *Meat Cutters* dissented from the proposition that hard core "anticompetitive commercial restraint[s]" like "price-fixing and market allocation" —and petitioner would add group boycotts—were subject to antitrust regulation even where bargained about. 381 U.S. at 732-33 (concurring opinion). As this Court unanimously warned in 1949, "Benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of antitrust fires." *United States* v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. 747 (1945). Similar arguments by football were rejected by this Court in *Radovich* as "without merit," and the reserve systems of other sports are now regulated by state and federal antitrust laws.

The argument comes with particular ill grace from Baseball which has always refused to "bargain" meaningfully about the Reserve Clause—even assuming that employees must "bargain" to remove unlawful restrictions on their freedom, or to secure the minimum wage required by law, or to end racial or other discrimination in hiring and promotion policy. Until this case was brought, Baseball would not discuss the reserve system with the players. Characteristically, during trial it contended—in court, not at the bargaining table—that the issue was one for collective bargaining. If anything is certain, it is that denial of certiorari here will terminate Baseball's sudden interest in bargaining over the reserve system. In any event, Baseball made clear in court that by "bargaining" it does not mean making concessions or changes. (App. 41a-42a)